

Supreme Court, U. S.

**FILED**

**AUG 2 1976**

MICHAEL RODAK, JR. CLERK

---

IN THE  
**SUPREME COURT OF THE UNITED STATES**

---

OCTOBER TERM, 1976

---

No. ....**75-1897**

---

HOWARD L. ROGERS,  
Petitioner,

vs.

THE BOARD OF TRUSTEES OF McKENDREE COLLEGE,  
Lebanon, Illinois, et al.,  
Appellees.

---

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

---

HOWARD BOMAN  
520 First National Bank Building  
East St. Louis, Illinois 62201

WILLIAM GAGEN  
109 West St. Louis Street  
Lebanon, Illinois 62254

Attorneys for Appellees



## INDEX

	Page
Opinion Below .....	1
Questions Presented .....	2
Statutory Provisions .....	2
Statement of the Case .....	3
Argument .....	5
Conclusion .....	8

## CITATIONS

### Cases Cited

Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) ...	6
Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975) .....	7
Collins v. Hardyman, 342 U.S. 651 (1951) .....	6
Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) .....	7
Griffin v. Breckinridge, 403 U.S. 88 (1971) .....	5, 6, 7
Lesser v. Braniff Airways, Inc., 518 F.2d 538 (1975) ...	7
McCurdy v. Steele, 353 F.Supp. 629 (C.D. Ut. 1973) ..	6
Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) ...	6
Stern v. Massachusetts Indemnity and Life Insurance Co., 356 F.Supp. 433 (E.D. Pa. 1973) .....	6

**Statutes Cited**

42 U.S.C. § 1983 .....	3, 4
42 U.S.C. § 1985(3) .....	2, 3, 4, 5, 6, 7
42 U.S.C. § 1986 .....	2, 3, 4, 5, 7

**Miscellaneous Cited**

Federal Rules of Civil Procedure, Rule 8(f) .....	5
---------------------------------------------------	---

IN THE  
**SUPREME COURT OF THE UNITED STATES**

---

OCTOBER TERM, 1976

---

No. ....

---

HOWARD L. ROGERS,  
Petitioner,

vs.

THE BOARD OF TRUSTEES OF McKENDREE COLLEGE,  
Lebanon, Illinois, et al.,  
Appellees.

---

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

---

Respondents, the Board of Trustees of McKendree College and numerous individuals as trustees or officials of McKendree College, oppose the allowance of petitioner, Howard L. Rogers' Petition for a Writ of Certiorari.

**OPINION BELOW**

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to the Petition for Writ of Certiorari.

### QUESTIONS PRESENTED

1. Whether petitioner stated a cause of action under U.S.C. Section 1985(3) in Counts I, II, III, IV and V of his Amended Complaint?

2. Whether petitioner stated a cause of action under 42 U.S.C. Section 1986 in Counts I, II, III, IV and V of his Amended Complaint?

### STATUTORY PROVISIONS

United States Code, Title 42 § 1985(3):

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or

privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Code, Title 42 § 1986:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in any action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding \$5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

### STATEMENT OF THE CASE

Petitioner filed an Amended Complaint in the District Court of the United States for the Eastern District of Illinois, attempting to allege causes of action under 42 U.S.C. § 1983, 1985(3), and 1986. Specific allegations are stated in each of the five Counts of the Amended Complaint.

In Counts I through V petitioner alleges violations of the First and Fourteenth Amendments.

Besides the allegations of violations of the First and Fourteenth Amendments, petitioner also alleges violations of his rights under the Fifth Amendment in the Counts II through V.

This case was before the District Court and the Court of Appeals on the Amended Complaint and Respondent's motion to dismiss.

The Court of Appeals for the Seventh Circuit affirmed the order of the District Court which dismissed the Amended Complaint for failure to state a cause of action.

The Ruling as to § 1983 is not challenged by petitioner.

The Rulings on § 1985(3) and 1986, which may be considered together, are what petitioner desires to have this Court review.

## ARGUMENT

In his Petition, petitioner contends that the decision of the Court of Appeals for the Seventh Circuit is contrary to prior decisions of the Supreme Court, that an important question of federal law left undecided in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), should now be decided, and that the decision conflicts with decisions of other Courts of Appeals as well as decisions of the Court of Appeals for the Seventh Circuit.

Essentially, petitioner continues to claim that the Second Amended Complaint states a cause of action under Sections 1985(3) and 1986.

The petitioner is correct in his contention that his pleading is, by Rule 8(f), required to be construed so as to substantial justice. This suggests liberality in construction to favor the pleader, but it cannot be read so as to disregard concern for substantial justice to the persons against whom the pleading is directed.

The Court of Appeals, as to 1985(3), affirmed the District Court for the simple reason that the Amended Complaint failed to include an allegation that the respondents acted, in conspiracy, because of a class-based discriminatory animus, there being no racial aspect to the case.

Such an allegation is an essential element in the statement of a cause of action under 1985(3). *Griffin v. Breckenridge*, 402 U.S. at 102, states the requirement as follows:

"The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."



*Griffin v. Breckenridge* swept away much of the previous law which had been handed down by the Federal Courts regarding § 1985(3). In reversing its decision in *Collins v. Hardyman*, 342 U.S. 651 (1951), this Court breathed new life into § 1985(3) as a remedy. To a large extent, the Court, in *Griffin*, rewrote the archaic language of 1985(3) by extending it to private conspiracies which would deny persons equal protection and equal rights under the law.

In deciding *Griffin*, however, the Court was conscious of the problem of opening up Federal Courts to volumes of litigation for wrongs committed by private groups or persons acting in concert which were not contemplated by the drafters of the original Statute. After reviewing the legislative history of § 1985(3), the Court noted the essential requirement that the motivational intent behind the conspiracy must be "racial or otherwise class-based invidiously discriminatory." 403 U.S. at 102.

In *Griffin*, the Court considered a private conspiracy to deny persons their constitutional protected rights because of their racial origin. However, Justice Stewart in his opinion opened the way for the inclusion of private conspiracies under § 1985(3), where a clearly defined class, based upon race, creed, religion or national origin has been the subject of conspiracy.

In *Stern v. Massachusetts Indemnity Life Insurance Company*, 356 F.Supp. 433 (E.D. Pa. 1973), a district court held that the plaintiff's allegations of job discrimination because of her sex stated a cause of action. Similarly the allegations of discrimination because of one membership in an Indian tribe was held sufficient in *McCurdy v. Steele*, 353 F.Supp. 629 (C.D. Ut. 1973). The Third Circuit extended the remedy provided by § 1985(3) to an individual subjected to conspiratorial discrimination because of his criticism of racial hiring policies. *Richardson v. Miller*, 446 F.2d 1247 (3rd Cir. 1971). Petitioner cites *Action v. Gannon*, 450 F.2d 1227 (8th Cir.

1971), in which the Court of Appeals ruled that a cause of action was stated under 1985(3) by a religious denomination of worship seeking a remedy from conspiratorial denial of their freedom.

Common in each of these decisions is the holding that the discriminatory intent was toward membership in an identifiable class. *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975). In other words, it must be the intent of the conspirators to deny a person his constitutionally guaranteed rights because of his membership in a race, creed, religion or another identifiable group.

It was not the intent of this Court in *Griffin v. Breckenridge* that the class, which is the subject of the discrimination, consist of all persons in the United States. Petitioner's Amended Complaint makes no attempt to limit the class as required by *Griffin*. As a result of this deficiency the Court of Appeals had no choice but to affirm the District Court's dismissal of the Amended Complaint. This decision was consistent with the Court of Appeals previous decisions in *Lesser v. Braniff Airways, Inc.*, 518 F.2d 538 (1975), and *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975).

Thus, the case which petitioner would have this Court review does not present a novel question to be decided. Simply stated, it is an instance of the failure of the pleading to state a cause of action because of the absence of an essential element, namely, the pleading of facts which show that the alleged conspiracy was based upon a racial or other class-based discriminatory intent. Absent that necessary element there is no cause of action stated under § 1985(3).

Since there was no violation of § 1985(3) allegation petitioner in his Amended Complaint, there was no cause of action permitted under § 1986.

The District Court and Court of Appeals so held.

## **CONCLUSION**

Respondents respectfully contend that the Petition should be denied.

**HOWARD BOMAN**

520 First National Bank Building  
East St. Louis, Illinois 62201

**WILLIAM GAGEN**

109 West St. Louis Street  
Lebanon, Illinois 62254

Attorneys for Appellees